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No. 798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ROBERT E. BELL,

Petitioner,

—against—

THE BUCKEYE UNION CASUALTY COMPANY

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Robert E. Bell, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause.

OPINIONS BELOW

The opinion of the District Court has not been reported. It is set forth at pp. 29-47 of the Appendix of Record accompanying and printed together with petitioner's original brief filed in the Court of Appeals. (Said appendix is hereinafter referred to as "Record.")

The opinion of the Court of Appeals has been reported at 249 F. 2d 211. A copy is appended as Appendix I.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1957 (infra, Appendix II). A petition for rehearing was denied on November 26, 1957 (infra, Appendix III). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. Section 1254 (1).

QUESTION PRESENTED

Whether, when language in an automobile liability policy excludes from coverage "liability assumed by the insured under any contract or agreement," the policy nevertheless provides coverage to the named insured thereunder in respect to liability for death and personal injuries caused by the negligent operation of an automobile by a minor whose application for a driver's license was signed by the named insured, such liability being predicated upon the provisions of a statute of the State of Indiana providing in part that any person signing such an application

> ". . . . thereby agrees to be responsible, jointly and severally with such applicant, for any injury or damage which such applicant may cause by reason of the operation of a motor vehicle, in all cases where the applicant is liable in damages."

STATUTES INVOLVED

Indiana Acts 1945, Chapter 304, Section 54, Volume II, pp. 1345-1346, Burns' Indiana Statutes Annotated (1952 Replacement), Section 47-2706, Volume 8 (Part 2), pp. 1267-1268, reads as follows:

> "(a) Every application for any permit or license to be issued under, and by virtue of, the provisions of this act, shall be made upon the approval (approved) form for such application, furnished by the department, and shall be verified by the applicant before a person authorized to administer oaths.
>
> (b) Every applicant shall state the name, age, sex and residence address of the applicant, and whether or not the applicant has been theretofore licensed as an operator, chauffeur, conditional

chauffeur, public passenger chauffeur, or has been the holder of a beginner's permit, or a school permit, and if so when and by what state, and whether or not such license or permit has ever been suspended or revoked, and if so, the date of, and the reason for, such suspension or revocation, and whether or not the applicant has been convicted of any crime punishable as a felony under the motor vehicle laws of this state, or any other felony in the commission of which a motor vehicle is used and if the applicant has any physical or mental disability, he shall so state in his application, giving the nature of such disability, and such other information as the commissioner may direct, such statements to be sworn to before a person authorized to administer oaths.

(c) The application, of any person, under the age of eighteen (18) years, for any permit or license to be issued under the provisions of this act, shall be signed and sworn to or affirmed before a person authorized to administer oaths, by the father of the applicant, if the father is living and has custody of such applicant, otherwise by the mother or guardian having the custody of such applicant, or in the event neither parent is living and the applicant has no guardian, then by the person having custody of him or by an employer of such applicant and in the event there is no parent, guardian, or employer, then by any other responsible person, who is willing to assume the obligations imposed upon him by the provisions of this section.

(d) Any person so signing such application as above provided thereby agrees to be responsible, jointly

and severally with such applicant, for any injury or damage which such applicant may cause by reason of the operation of a motor vehicle, in all cases where the applicant is liable in damages.

(e) Any person, who has so signed the application of such applicant for a permit or license, may thereafter file with the department a verified written request that such permit or license so granted be canceled. Thereupon the department shall cancel such permit or license and the person, who signed the application of such minor applicant, shall be relieved from the liability imposed under this section, by reason of having signed such application, thereafter incurred by such minor in operating a motor vehicle.

(f) When such minor applicant reaches the age of eighteen (18) years, the person who has signed said minor's application shall be relieved from the liability, imposed under this section, thereafter incurred by such minor in operating a motor vehicle under this section.

(g) In the event of the death of such signer, the permittee or licensee shall notify the department of the decease of the signer and obtain a new signer.

(h) The department, upon receipt of satisfactory evidence of the death of the person who signed the application of such minor for a permit or license, and upon the failure of the permittee or licensee to obtain a new signer, shall cancel such permit or license and shall not issue a new permit or license until such time as a new application duly signed and verified is made as required by this section."

Indiana Acts 1935, Chapter 162, Section 177, p. 722. Burns' Indiana Statutes Annotated (1952 Replacement), Section 39-4309, Volume 8 (Part 1), p. 224, reads as follows:

"No policy of insurance against loss or damage resulting from accident to, death or injury suffered by an employee or other person or persons and for which the person or persons insured are liable, or, against loss or damage to property resulting from collision with any moving or stationary object and for which loss or damage the person or persons insured is liable, shall be issued or delivered in this state by any domestic or foreign corporation, insurance underwriters, association, or other insurer authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person or persons insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person or his or her personal representative in case death resulted from the accident because of such insolvency or bankruptcy then an action may be maintained by the injured person, or his or her personal representative, against such domestic or foreign corporation, insurance underwriters, association or other insurer under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy. No such policy shall be issued or delivered in this state by any foreign or domestic corporation, insurance underwriters, association or other insurer authorized to do business in this state, unless there shall be contained within such policy a provision that notice given by or on behalf of the insured to any authorized agent of the insurer within this state,

with particulars sufficient to identify the insured, shall be deemed to be notice to the insurer. No such policy shall be issued or delivered in this state to the owner of a motor vehicle, by any domestic or foreign corporation, insurance underwriters, association or other insurer authorized to do business in this state, unless there shall be contained within such policy a provision insuring such owner against liability for damages for death or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner. A policy issued in violation of this section shall, nevertheless, be held valid but be deemed to include the provisions required by this section, and when any provision in such policy or rider is in conflict with the provision required to be contained by this section, the rights, duties and obligations of the insurer, the policyholder and the injured person or persons shall be governed by the provisions of this section."

STATEMENT OF THE CASE

This action was instituted in the United States District Court for the Southern District of Indiana by respondent, The Buckeye Union Casualty Company, to obtain a declaratory judgment that an automobile liability policy issued by it to petitioner, Robert E. Bell, did not provide coverage for him or other persons in respect to liability then being asserted against petitioner and other persons in another action already pending in that court. The action that was already pending in the District Court below when this action was filed was the case of Virginia J. Weigle, Administratrix, et al. v. Ralph E. Brill, Administrator, et al. In that pending action, Virginia J. Weigle, both as administratrix of the estate of Edward T. Weigle, deceased, and in her individual capacity,

and the two minor children of Virginia J. Weigle, were seeking to recover damages for wrongful death of their decedent, Edward T. Weigle, and damages for personal injuries, from various defendants, including petitioner.

In this declaratory judgment action, respondent joined as defendants, first, the persons who were the plaintiffs in the pending lawsuit instituted by the members of the Weigle family, and, second, two of the persons who were defendants in the pending lawsuit instituted by Virginia J. Weigle and her two minor children, namely, petitioner Robert E. Bell, and one Ralph E. Brill, administrator of the estate of Joseph Bell. The jurisdiction of the District Court in this action was based upon the diversity of citizenship existing between the plaintiff-respondent insurance company on the one hand and the various defendants on the other.

After all defendants had filed an answer, they filed a motion for summary judgment seeking an adjudication that the automobile liability policy issued by the respondent to petitioner did provide petitioner with coverage in respect to the liability asserted against him by the members of the Weigle family in the pending Weigle lawsuit. A cross motion for summary judgment was filed by respondent. The District Court overruled petitioner's motion for summary judgment, granted respondent's motion for summary judgment, adopted for its memorandum opinion the proposed memorandum opinion filed by respondent, and entered a judgment adjudicating that respondent under the insurance policy in question was under no obligation either to petitioner or to anyone in respect to claims then being asserted in the pending Weigle Case. (Record, p. 28)

Petitioner appealed to the Court of Appeals. The Court of Appeals affirmed the judgment of the District Court, and denied petitioner's petition for rehearing. (Appendices II and III, infra)

Adjudication of the issues posed by the pleadings involved analysis of two factors about which there was no factual dispute. One factor was the nature of the liability being asserted against petitioner in the pending Weigle lawsuit. The other factor was the content of the insurance policy issued by respondent to petitioner.

As to the first factor, the Weigles were alleging that they were entitled to recover damages because their decedent had been wrongfully killed, and they had received personal injuries, as the result of the negligent operation of an automobile by one Joseph Bell. The Weigles were not attempting to link petitioner to the negligence of Joseph Bell by invoking the doctrine of **respondeat superior.** Instead, the Weigles in their lawsuit claimed that petitioner was responsible for the negligence of Joseph Bell on the following ground, as stated in their complaint:

> "Prior to the time of the collision complained of herein the defendant Robert E. Bell signed Joseph Bell's application for an Indiana Motor Vehicle Operator's License, and in so doing the defendant Robert E. Bell made a written undertaking as a part of said application wherein the defendant Robert E. Bell agreed to be responsible, jointly and severally, with the said Joseph Bell, for any injury or damage which said Joseph Bell might cause by reason of Joseph Bell's operation of a motor vehicle in all cases where Joseph Bell is liable in damages. Said application is in the custody and control of The Indiana Bureau of Motor Vehicles, and plaintiff does not have a true copy of said written promise." (Record, p. 22)

And in this action instituted by respondent, petitioner agreed with the allegations of respondent that at the time of the automobile collision involved in the Weigle Case Joseph Bell had not been an employee of petitioner; and petitioner has admitted that at the time and place of the collision involved

in the Weigle Case Joseph Bell had not been driving the automobile specifically described in the automobile liability policy issued by respondent to petitioner. (Record, pp. 15-17)

The liability asserted against the petitioner in the Weigle Case, therefore, if established, would arise out of petitioner having signed an application for a driver's license in Indiana for Joseph Bell and would be predicated upon the provisions of the Indiana statute referred to above, Burns' Indiana Statutes Annotated (1952 Replacement) Section 47-2706.

As to the second factor, the content of the policy in question, respondent agreed with petitioner, under Clause I of the "Insuring Agreements" of the policy, in part, as follows:

> "I. COVERAGE A—BODILY INJURY LIABILITY—TO PAY on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile . . ."

Clause V of the "Insuring Agreements" of the policy read as follows:

> "V. USE OF OTHER AUTOMOBILES
>
> If the named insured is an individual who owns the automobile classified as 'pleasure and business' or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile applies with respect to any other automobile, subject to the following provisions:
>
> (a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes (1) such named insured,

(2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.

(b) This insuring agreement does not apply:

(1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;

(2) to any automobile while used in the business or occupation of the named insured or spouse except a private passenger automobile operated or occupied by such named insured, spouse, chauffeur or servant;

(3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;

(4) under coverage C, unless the injury results from the operation of such other automobile by such named insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such named insured or spouse." (Record, pp. 14-15)

Under the "Exclusions" section of the policy, coverage is excluded in respect to "liability assumed by the insured under any contract or agreement . . ." (Record, p. 5). Also, paragraph 16 (b) under the "Conditions" section of the policy read as follows:

"ASSISTANCE AND COOPERATION OF THE INSURED Coverages A, B, D, E, F, G, H and I: The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident."

(See Additional Appendix accompanying and printed as part of petitioner's reply brief filed in the Court of Appeals below.)

ARGUMENT FOR ALLOWANCE OF WRIT

That the judgment of the Court of Appeals is the first and only decision by any appellate tribunal to hold that a named insured who signs an application for a minor's driver's license under a statute like Burns' Indiana Statutes Annotated (1952 Replacement) Section 47-2706 is thereby assuming a liability that sounds in contract, or that is within the purview of the "contract or agreement" exclusionary language of an automobile liability policy; that the opinion of the Court of Appeals discloses on its face misapprehension of the issues posed by the record;* that the Court of Appeals affirmed

* The opinion of the Court of Appeals states that "from a careful consideration of this language"—namely, the "Use of Other Automobiles" clause in the Insuring Agreements of the policy—"it became obvious that Joseph Bell is not a person included" in said clause. But it was never relevant whether or not Joseph Bell had insured status under the policy. Petitioner admitted in its answer that Joseph Bell was neither the named insured nor an insured of any kind under the policy in question. The Court of Appeals was not faced with the question of sanctioning an infinite extension of coverage among minors, even engaging in the improbable assumption that petitioner was likely to sign the applications for driver's licenses of an infinite number of minors. It is petitioner, the named insured under the policy, who is being deprived of coverage by the opinion below.

the judgment of the District Court on the basis of a cursory statement that "We agree" with respondent's contention concerning the exclusionary language in question—that, in short, the Court of Appeals reached an erroneous conclusion in an opinion that disposed of difficulties by ignoring them may not, by itself, warrant review on certiorari of this case by the Court. But this erroneous decision of the Court of Appeals impinges upon a problem that is of major practical importance to the public generally in day by day living in this country.

The problem referred to is how to accommodate, on the one hand, the economic and social forces in our national life that press for the granting of permission to minors to drive automobiles with, on the other hand, the need for the existence of financial responsibility behind the drivers' wheel of the country's automobiles and other motor vehicles. The teenager who needs to work to supplement the family income and who needs to drive in order to work; or the teenager who wants to drive the family car and who will forfeit, or who thinks he will forfeit, prestige among his peers if he is not permitted to drive; the parents who are importuned to hand over family car keys to their teenage youngsters—these are familiar sociological phenomena today.

However, it is precisely the teenage driver who is apt to drive fast. According to a pamphlet published by the National Safety Council, entitled "Accident Facts (1957 Edition), p. 63, drivers under 18 years of age and in the 18-20 age group were involved in fifteen per cent of the fatal motor vehicle traffic accidents in 1956. And, according to that pamphlet, p. 52, a study made at Iowa State College indicated that, on the basis of 100,000 miles of travel, accident rates by age groups of male drivers in Iowa were as follows: 16-21 years: 1.5; 22-27 years: 1.0; 28-47 years: 0.7; and 48-65 years: 0.6.

In Burns' Indiana Statutes (1952 Replacement) Section 47-2706, the Indiana legislature recognized the necessity for permitting teenagers to drive if some attempt is made to obtain financial responsibility. The issuance of a driver's license to a minor is conditioned upon the application of the minor being signed by an adult, and responsibility for any harm caused by the teenager's use of a motor vehicle is imposed upon the adult who sponsors the application. Other states have evinced similar recognition of the problem by enacting statutes substantially similar to the Indiana statute. See Annotation, 26 ALR (2d) 1320-1333.

In Bispham v. Mahoney, 37 Del. 285, 183 A. 315 (1936), a Delaware court explained the legislative policy in enacting a statute like Burns' Indiana Statutes Annotated (1952 Replacement) Section 47-2706.

> "The legislative purpose was to protect the public and the statutes were drawn to effect the purpose in the most practical way. Undoubtedly the legislature had in mind the fact that many minors under the age of 18 years have the ability and judgment to operate motor vehicles; that, in many cases, for economic reasons, it is just as necessary for such minors to employ themselves usefully by operating motor vehicles as to drive teams; and that the universal ownership and use of motor vehicles demanded a lawful operation by certain minors under the given age rather than an unlawful operation. So, having in mind the practical aspect of the matter, provision was made for the licensing of minors under 18 years, having demonstrated ability, as all licensees must. But, having in mind also, that caution, discretion and judgment are not youthful traits, the right was safeguarded by requiring the application to be signed by someone, having custody or charge of

the minor, who might be supposed to have intimate knowledge of the applicant's characteristics, and who would be willing to assume liability for injuries caused by the minor's negligence." 183 A. 316

But how is the father of a teenager who signs an application for the minor to fund the contingent responsibility in damages for the negligence of the minor? The father cannot purchase any general public liability policy that will protect himself and the public; under current underwriting practices, as the Court may judicially notice, any general public liability policy which one can buy today excludes coverage for liability arising out of use of a motor vehicle. Both the parents of teenagers, and the potential victims of teenager negligence, are vitally interested in the availability of insurance protection for the adult who sponsors the issuance of a driver's license to a teenager. That insurance protection either is available under the standard automobile policy or it is not available at all.

Considered in the context of this problem, the erroneous disposition by the Court of Appeals of the issues posed by the record in case should not be left unrepudiated by the Court.

Two issues were posed to the Court of Appeals. Putting to one side temporarily the question whether any specific exclusionary language in the policy involved deprived petitioner of coverage otherwise available, the first issue was whether or not the Insuring Agreements of the policy provided petitioner with coverage in respect to the liability claim asserted against him in the Weigles' lawsuit. This issue existed because Joseph Bell, the minor for whom petitioner had signed an Indiana application for a driver's license, was charged by the Weigles with negligence in operating an automobile that was not owned by petitioner and that was not

specifically described in the policy. The issue was whether or not Clause V of the Insuring Agreements of the policy, the "Use of Other Automobiles" clause, correlated with Clause I of the Insuring Agreements, the bodily injury liability general coverage clause, to provide petitioner with insurance protection.

The Court of Appeals did not resolve this first issue in its opinion. The opinion of the Court of Appeals expressly states that its conclusion to affirm the judgment of the District Court "is not affected by the defendant's argument" that the Use of other Automobiles clause of the policy Insuring Agreements was applicable. The Court of Appeals necessarily proceeded on the supposition that it was immaterial whether or not the legal liability of petitioner, predicated on signing the application for a minor's driver's license, arose out of the use of an automobile other than the one specifically described in the policy. The Court of Appeals turned its decision on a conclusion reached as to the second issue posed by the record, namely, whether or not specific exclusionary language in the policy barred petitioner from coverage.

What the Circuit Court of Appeals specifically decided relates to the exclusionary language in the policy barring from coverage any liability assumed by the insured under "contract or agreement." The Court of Appeals held that this exclusionary language operated to place outside policy protection a legal liability of the named insured predicated upon signing an application for a minor's driver's license whether or not the harm for which the named insured is liable is caused by the minor in operating the automobile owned by the named insured and specifically described in the policy.

This holding is erroneous for a number of reasons. First, it contravenes the provisions of the Indiana Insurance Code.

Burns' Indiana Statutes Annotated (1952 Replacement) Section 39-4309 prohibits the issuance in Indiana of an automobile liability policy to the owner of any motor vehicle unless the policy insures

> ". . . such owner against liability for damages for death or injury to person or property resulting from *negligence* in the operation of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner."

The Indiana courts have held that this statute means what it says and requires every automobile liability policy issued in Indiana to cover a legal liability of the named insured arising out of the use of the automobile specifically described in the automobile liability policy (other than liability arising out of illegal use of the automobile, as for example, use thereof by a minor without driver's permit in violation of law). Culley v. Farm Bureau Mut. Ins. Co. of Indiana, Inc., 224 Ind. 483, 69 N. E. 2d 19 (1946); Shadow v. Standard Acc. Ins. Co., 111 Ind. App. 19, 39 N. E. 2d 493 (1942).

In contravention of this Indiana authority, the decision of the Court of Appeals is a precedent for the following startling proposition, namely: That when a father (or any person) signs in Indiana (or any state having a statute like Burns' Section 47-2706) an application for a drivers license for his son (or other minor), and the minor thereafter causes harm in operating the father's own automobile, the automobile policy issued to the father as the named insured and specifically describing that automobile does not provide the father with coverage in respect to the liability imposed by statute as a result of having signed the application.

Second, the decision of the Court of Appeals is erroneous because the exclusionary language relating to liability as-

sumed under "contract or agreement" presents some ambiguity in that it is not to be taken literally. Even respondent admitted (see the opinion of the District Court drafted by counsel for respondent, Record, p. 41) that not all contractual liability is barred by the language involved from coverage; respondent asserted that contractual liability arising out of the entry by the named insured into what respondent called "collateral relationships" is covered by the policy notwithstanding the exclusionary language in question. An example of a factual situation to which, literally read, the exclusionary language would seem to be applicable but in respect to which it is certainly the understanding of the insurance bar, petitioner believes, that automobile liability policy protection exists, would be the following: The named insured under such a policy bails his automobile specifically described in the policy to a person who the named insured knows or should know is not a safe driver. The named insured may be found to have incurred liability as a result of the bailment agreement. See Opple v. Ray, 208 Ind. 450, 195 N E. 81 (1935). The exclusionary language being ambiguous, the Court of Appeals disregarded the principle of insurance policy construction followed by the courts of the State of Indiana by resolving the ambiguity so as to deprive, instead of to grant, coverage. Masonic Acc. Ins. Co. v. Jackson, 200 Ind. 472, 164 N. E. 628 (1929).

Third, the legal liability asserted against petitioner by the Weigles was simply not one that can be described as having been assumed "under any contract or agreement." The simple proof of this assertion is that liability is predicated upon Burns' Indiana Statutes Annotated Section 47-2706; that paragraph (d) of this statute directs that any person who signs a minor's application "thereby agrees" to be jointly and severally responsible with the minor for injury or damage

that the minor causes by reason of the operation of a motor vehicle; that the word "agrees" in this quoted language is obviously only a linguistic technique for imposing liability; that it is clearly immaterial under the statute whether the sponsor for the minor agrees to be jointly and severally responsible with the minor or whether he even knows or suspects that any legal consequences flow from signing the application; and that the Indiana statute itself describes in paragraph (e) the liability of the sponsor for the minor as "the liability imposed under this section, by reason of having signed such application . . ." All decisions prior to the decision of the Court of Appeals had held that a named insured under an automobile liability policy who signs an application for a minor's driver's license under a statute like Burns' Section 47-2706 is not thereby assuming a liability that sounds in contract, or that is within the scope of the "contract or agreement" exclusionary language of the automobile liability policy.

Marple v. American Automobile Ins. Co.,
82 Cal. App. 137, 255 P. 260 (1927)

Lackey v. Olds & Stoller Interexchange,
80 Cal. App. 687, 252 P. 672 (1927)

Hickman v. Tullos, 121 F. Supp. 152
(N.D. Ala. 1954)

McFarland v. Cordiero, 99 Cal. App. 352,
278 P. 889 (1929)

Robinson v. Hardaway, 293 Ky. 627,
169 S. W. 2d 823 (1943).

Fourth, even if petitioner did enter into a "contract or agreement," he did so only by virtue of signing the application for Joseph Bell. But at the time he entered into a "contract" by signing the application, petitioner did not assume a "liability" because there was then no fixed and presently existing duty to respond in damages. Liability arose only sub-

sequently to petitioner's execution of the "contract" as the result of subsequent use by the minor of an automobile causing harm. The exclusionary language relied on by the Court of Appeals for denying coverage does not, despite its literal import, apply to bar coverage for legal liability of the named insured which is only contingent at the time the named insured enters into the "contract or agreement." Preferred Accident & Insurance Company of New York v. Onali, 125 F. 2d 580 (8 Cir. 1942).

It is possibly unimportant under what rubric in the scheme of classifying discretionary grounds justifying allowance of the writ the error of the Court of Appeals is categorized. Whether the decision of the Court of Appeals be described as one conflicting, as it does, with the decision of another Court of Appeals, or as deciding, as it does, an important state question in a way in conflict with applicable state law, would not seem to be crucial. What should commend itself to the discretion of the Court, as a ground for the allowance of the writ here, is the fact that, if left unrepudiated, the decision of the Court of Appeals will be a precedent that deprives the public of insurance protection under the standard automobile liability policy in precisely the situation where, if insurance protection is not obtainable under such a policy, it is not obtainable at all. The decision of the Court of Appeals thus thwarts solution of the social and economic problem referred to above. The very practical consequence of the decision of the Court of Appeals is either that there is to be no insurance protection for adults who sponsor the issuance of drivers' licenses to teenagers or that persons must be discouraged from signing teenager applications for driver's licenses.

Petitioner asks the Court to notice judicially that the automobile liability policies issued by all major underwriters

in the country are cast in substantially uniform terms, and that the focal point of the decision of the Court of Appeals —the "contract or agreement" exclusionary language—is a standard clause in these policies.

Petitioner would suggest to the Court that uniformity and soundness of interpretation of the "contract or agreement" exclusionary language in the automobile liability policy—and that the problem of reconciling the economic and social need for minors being permitted to drive motor vehicles with the compelling need for financial responsibility on the nation's highways—is of no less vital importance to the day by day activities of the inhabitants of the United States of America (its pedestrians, its fathers and other custodians of minors and all persons who drive automobiles) than adjudication concerning some esoteric clause of the Internal Revenue Code.

Accordingly, it is submitted that the requested writ should issue.

Respectfully submitted,
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APPENDIX I

In the

United States Court of Appeals

For the Seventh Circuit

No. 12063 — SEPTEMBER TERM, AND SESSION, 1957

THE BUCKEYE UNION CASUALTY COMPANY,
Plaintiff-Appellee,
vs.
ROBERT E. BELL, ET AL.,
Defendants,
(Robert E. Bell, *Appellant*).

Appeal from the United States District Court for the Southern District of Indiana.

October 31, 1957

Before **Duffy, Chief Judge,** and **Schnackenberg** and **Hastings, Circuit Judges.**

Schnackenberg, Circuit Judge. Robert E. Bell, defendant, has appealed from orders of the district court denying certain defendants' motion for summary judgment and granting plaintiff's motion for summary judgment, and from its judgment adjudicating that plaintiff has no obligation to defendant Robert E. Bell (hereinafter referred to as "defendant"), the named insured in an automobile liability policy issued by plaintiff, in respect to an automobile accident occurring in Pennsylvania while said policy was in effect.

Plaintiff's action sought a declaratory judgment that it is not required by said policy to defend Robert E. Bell or anybody else in another action pending in the court below or to pay any judgment that might be recovered in that action. The other pending action (referred to herein

as the "Weigle case") is **Virginia J. Weigle, administratrix, et al., v. Ralph E. Brill, administrator of the estate of Joseph Bell, deceased, et al.** In the case before us plaintiff sued the persons who are plaintiffs in the **Weigle** case,[1] said defendant Robert E. Bell and Ralph E. Brill, administrator of the estate of Joseph Bell, deceased.[2]

It is admitted that no material fact issues exist in this case. The undisputed relevant facts we now state.

The **Weigle** case plaintiffs charged Joseph Bell with negligence in the operation of a certain motor vehicle which was involved in a collision on April 17, 1955. That vehicle was not owned by defendant or by Joseph Bell, now deceased, or described in said policy. The **Weigle** case raises issues concerning the liability, if any, of defendant to the plaintiffs in that case. The Weigle complaint alleged, **inter alia**:

> "Prior to the time of the collision complained of herein the defendant Robert E. Bell signed Joseph Bell's application for an Indiana Motor Vehicle Operator's License, and in so doing the defendant Robert E. Bell made a written undertaking as a part of said application wherein the defendant Robert E. Bell agreed to be responsible, jointly and severally with the said Joseph Bell, for any injury or damage which said Joseph Bell might cause by reason of Joseph Bell's operation of a motor vehicle in all cases where Joseph Bell is liable in damages." [3]

[1] Virginia J. Weigle, administratrix of the estate of Edward T. Weigle, deceased, Virginia J. Weigle, Charles Weigle, by his next friend Virginia J. Weigle, and Margaret Ann Weigle, by her next friend, Virginia J. Weigle.

[2] Other defendants named in the **Weigle** case are not involved here.

[3] At the time of the collision, according to the opinion filed by the district court, Joseph Bell was a minor. This fact is not disputed by either side, although whether he was under the age of 18 does not affirmatively appear in the record. From the fact that, in order to get a driver's license, defendant herein signed Joseph Bell's application, it seems to be assumed that Joseph was then under the age of 18 years. Whether he was related in any way to defendant is, on this record, a matter of conjecture. Anyhow, that is immaterial.

The policy provides bodily injury and property damage liability and comprehensive coverage for a certain described Pontiac automobile. Item 5 of the "Declarations" in the policy describes the purpose for which the Pontiac is to be used as "business and pleasure."

The policy recites that plaintiff agrees with defendant, in part:

"I. COVERAGE A — BODILY INJURY LIABILITY— TO PAY on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.

* * * *

"II. DEFENSE * * * As respects the insurance afforded by the other terms of this policy under coverages A and B the company shall: (a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof * * *.

* * * *

"IV. AUTOMOBILE DEFINED * * * (a) Automobile. Except where stated to the contrary, the word 'automobile' means: (1) Described Automobile — the motor vehicle or trailer described in this policy. * * *

* * * *

"V. USE OF OTHER AUTOMOBILES: If the named insured is an individual who owns the automobile classified as 'pleasure and business' or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability,

for property damage liability and for medical payments with respect to said automobile applies with respect to any other automobile, subject to the following provisions:

(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes (1) such named insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III. Definition of Insured, does not apply to this insurance.

(b) This insuring agreement does not apply:

(1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to, the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;

(2) to any automobile while used in the business or occupation of the named insured or spouse except a private passenger automobile operated or occupied by such named insured, spouse, chauffeur or servant;

(3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;

(4) under coverage C, unless the injury results from the operation of such other automobile by such named insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such named insured or spouse."

In a part of the policy entitled "Exclusions", it is provided, in part:

"THIS POLICY DOES NOT APPLY: * *

(b) under coverages A, B and C, to liability assumed by the insured under any contract or agreement, * *."

In that part of the policy entitled "Conditions", it is provided, in part:

"16. ASSISTANCE AND COOPERATION OF THE INSURED * * * The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident. * * *"

Also:

"23. TERMS OF POLICY CONFORMED TO STATUTE. Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes."

Count II of plaintiff's complaint averred the following (summarized) facts, which are admitted by defendants' answer:

"(1) The automobile involved in the collision of April 17, 1955 operated by Joseph Bell was not the automobile specifically described in the Policy, and Joseph Bell was 'not the named insured under the policy . . .';

"(2) Neither defendant nor any person for his use or benefit drove, maintained, used or owned the automobile involved in the collision in the **Weigle Case**, nor did defendant's wife drive, operate, use or maintain said automobile;

"(3) Neither defendant, 'the named insured under' the policy, nor his wife, exercised any control over Joseph Bell during the relevant period; nor did Joseph Bell during that period operate the automobile involved in the collision for the use or benefit of either defendant or his wife;

"(4) Joseph Bell operated the automobile for the sole use and benefit of hmiself or others, not for the use or benefit of defendant or defendant's wife; and Joseph Bell exercised no control over, nor responsibility for, any activities of defendant or defendant's wife; and neither defendant nor his wife nor Joseph Bell had any 'connection, understanding or any arrangement' among themselves concerning the operation or use of the automobile involved in the collision;

"(5) By 'reason of the above and foregoing allegations,' Joseph Bell was neither the named insured nor an insured of any kind under the Policy."

At all times relevant in this case, there was in force a driver's license statute in Indiana (Burns Ind. Statutes 1952, Sec. 47-2706) which, so far as now involved, reads as follows:

"(c) The application, of any person, under the age of eighteen [18] years, for any permit or license to be issued under the provisions of this act, shall be signed and sworn to or affirmed before a person authorized to administer oaths, by the father of the applicant, if the father is living and has custody of such applicant, other-

wise by the mother or guardian having the custody of such applicant, or in the event neither parent is living and the applicant has no guardian, then by the person having custody of him or by an employer of such applicant and in the event there is no parent, guardian, or employer, then by any other responsible person, who is willing to assume the obligations imposed upon him by the provisions of this section.

"(d) Any person so signing such application as above provided thereby agrees to be responsible, jointly and severally with such applicant, for any injury or damage which such applicant may cause by reason of the operation of a motor vehicle, in all cases where the applicant is liable in damages.

"(e) Any person, who has so signed the application of such applicant for a permit or license, may thereafter file with the department a verified written request that such permit or license so granted be canceled. Thereupon the department shall cancel such permit or license and the person, who signed the application of such minor applicant, shall be relieved from the liability imposed under this section, by reason of having signed such application, thereafter incurred by such minor in operating a motor vehicle.

"(f) When such minor applicant reaches the age of eighteen [18] years, the person who has signed said minor's application shall be relieved from the liability, imposed under this section, thereafter incurred by such minor in operating a motor vehicle under this section."

The Weigle case plaintiffs assert liability against Robert E. Bell because he signed the application of Joseph Bell for a

driver's license under the Indiana statute "wherein [they say] the defendant Robert E. Bell agreed to be responsible for any injury or damage which said Joseph Bell might cause by reason of Joseph Bell's operation of a motor vehicle in all cases where Joseph Bell is liable for damages."

Plaintiff relies on its policy provision excluding coverage of liability assumed by the insured under any agreement. It argues that defendant, in signing such application agreed to assume liability for the injuries alleged to have been caused by Joseph Bell. For this reason, inter alia, it contends that the policy does not provide coverage with respect to the liability asserted against defendant by the plaintiffs in the Weigle case and does not impose any obligation on plaintiff to defend that action. We agree.

Our conclusion is not affected by defendant's argument that insuring agreement V—Use of Other Automobiles—applies to this case. That clause is limited by its specification that the unqualified word "insured" includes the named insured and his spouse, if a resident of the same household, and any other person or organization legally responsible for the use by the named insured or spouse of an automobile not owned or hired by such other person or organization. From a careful consideration of this language, it becomes obvious that Joseph Bell is not a person included in insuring agreement V.

The cases of **Lackey v. Olds & Stoller Interexchange**, 80 Cal. App. 687, 252 Pac. 672, and **Marple v. American Automobile Ins. Co.**, 82 Cal. App. 137, 255 Pac. 260, relied on by defendant, are inapplicable here because they are distinguishable both on the facts and the law.

For the reasons aforesaid, the judgment of the district court is affirmed.

AFFIRMED.

APPENDIX II

United States Court of Appeals For the Seventh Court

Chicago 10, Illinois

Thursday, October 31, 1957

Before

HON. F. RYAN DUFFY, Chief Judge

HON. ELMER J. SCHNACKENBERG, Circuit Judge

HON. JOHN S. HASTINGS, Circuit Judge

THE BUCKEYE UNION CASUALTY COMPANY, *Plaintiff-Appellee,* vs. ROBERT E. BELL *Defendant-Appellant.* No. 12063	Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs.

APPENDIX III

United States Court of Appeals For the Seventh Court

Chicago 10, Illinois

Tuesday, November 26, 1957

Before

HON. F. RYAN DUFFY, Chief Judge

HON. ELMER J. SCHNACKENBERG, Circuit Judge

HON. JOHN S. HASTINGS, Circuit Judge

THE BUCKEYE UNION CASUALTY COMPANY,
Plaintiff-Appellee,

No. 12063

vs.

ROBERT E. BELL, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 798

ROBERT E. BELL,
Petitioner,

vs.

THE BUCKEYE UNION CASUALTY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 798

ROBERT E. BELL.

Petitioner,

vs.

THE BUCKEYE UNION CASUALTY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the District Court (Petitioner's Appendix of Record pp. 29 through 47) is appended to this Brief as *Appendix A* hereof.

JURISDICTION.

Supplementing the jurisdictional statement appearing in petition at page 1 thereof, it is noted that the time within which jurisdiction of this court must be invoked is prescribed in Rule 22(c) of this court, and Title 28 U. S. C. Sec. 2101(c) to be within 90 days after the entry of the judgment or decree to be reviewed.

The character of reasons which will be considered for invoking the jurisdiction of this court as prescribed by Rule 19(b) of this court, include (a) where a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter; and (b) has decided an important state question in a way in conflict with applicable state law.

STATUTES INVOLVED.

Indiana Acts 1945, Chapter 304, Section 70, Volume II, page 1308, *Burns Indiana Statutes Annotated* (1952 Replacement) Section 47-2904, Volume 8 (Part 2), page 1286, reads as follows:

> "47-2904. *Minor, permitting to drive without license unlawful.*—It shall be unlawful for any person having any vehicle in his custody to cause or knowingly permit any minor under the age of eighteen (18) years to drive such motor vehicle upon the public highways unless such minor shall have first obtained a license or permit as provided in this act."

QUESTIONS PRESENTED.

1. Whether an automobile liability insurance policy which excludes from coverage "liability assumed by the named insured under any contract or agreement" provides coverage to the named insured thereunder, with respect to liability incurred by the named insured solely by reason of his having signed a minor's drivers license application, under the terms of which and by reason of the statutory provisions applicable, he thereby agreed to be responsible for injury or damage caused by such minor to another in connection with the use by such minor of an automobile not described in the policy as an automobile covered by the policy and an automobile neither owned, maintained nor being used by or for the benefit of the named insured.

2. Whether the Court of Appeals decision is in conflict with any decision of another Court of Appeals, or the law of the State of Indiana, with respect to the above question pertaining to the law of the State of Indiana.

STATEMENT OF THE CASE.

Petitioner admitted the allegation of respondent that at the time of the automobile collision involved in the *Weigle* case, neither the named insured Robert Bell himself, nor any person for his use or benefit, drove, maintained, used or owned the automobile involved in the collision referred to, nor did the wife of Robert Bell drive, operate, own, maintain or use the automobile involved in said collision, and that the automobile involved in the collision was an automobile not described and different from the automobile described in the insurance policy involved, and that, in fact, neither of Robert Bell or his wife, nor Joseph Bell had any connection, understanding or arrangement whatsoever among themselves concerning the operation or use of the automobile at any time. (Rec. pp. 10-11, 16-17, 49.)

Said insurance policy under Exclusion Rights reads in part as follows:

> "THIS POLICY DOES NOT APPLY: * * * (b) under Coverages A, B and C to liability assumed by the insured under any contract or agreement * * *." (Rec. p. 15.)

ARGUMENT.

Petitioner asserts that the Court of Appeals holds that a named insured who signs an application for a minor's drivers license under a statute like *Burns Indiana Statutes Annotated* (1952 Replacement) Section 47-2706, is thereby assuming a liability that sounds in contract or is within the purview of the "contract or agreement" exclusionary language of an automobile liability policy. (Pet. p. 11.)

Actually, the Court of Appeals holds that the defendant in signing such application *agreed* to assume liability for injuries—not that the assumption sounds in contract—and that the policy excluded coverage or liability thus assumed by agreement. (Pet. p. 28.)

The Court of Appeals did not base its decision upon whether or not the liability of the named insured sounded in tort or contract, but solely upon the premise that the named insured had voluntarily agreed to be responsible for injury caused by another, and such voluntary agreement constituted the type of agreement with respect to which any liability was excluded under the terms of the policy.

The petitioner asserts that the Court of Appeals disclosed a misapprehension of the issues posed by the record in stating that Joseph Bell is not a person included in Insuring Agreement V B. (Pet. p. 11.) It is apparent from the opinion of the Court of Appeals (Pet. p. 28) that the court was discussing whether or not Clause V of the policy should be considered as extending coverage under the circumstances of this case, with respect to injury, occasioned by the use by Joseph Bell, a stranger to the policy, of an automobile strange to the policy, and not

whether or not Joseph Bell was or was not to be considered himself entitled to protection as an insured under the policy. The court holds that Clause V is limited by its subsection pertaining to the unqualified word "insured" (that the scope of Clause V should be construed as consistent with such limitation) and, therefore, the court's conclusion is not to be affected—or policy coverage is not to be extended to the strange automobile used by and for the benefit of a person strange to the policy—by Clause V. (Pet. p. 28.)

The court does not base its opinion on whether or not Joseph Bell is or is not an insured person, but it does say that he is not a person included in the insuring Agreement V. It is apparent that the court in its opinion means that Clause V covers as an insured risk with respect to the use of automobiles not described in the policy, the named insured or his spouse, and persons responsible for the use of the non-described automobile by the named insured or his spouse, and that Joseph Bell is not included in the language of Clause V as a person *whose use* of the non-described automobile involves a risk, as distinct from a risk involving a use by or for the benefit of the named insured, covered by the policy in that the liability imposed upon the named insured by the drivers license statute does not arise by reason of the use of a non-described automobile by or for the benefit of the named insured, or a person responsible for the use by or for the benefit of the named insured. That Joseph Bell's use of the non-described automobile is not the use of a non-described automobile with respect to which coverage is granted under Clause V of the policy to anyone, including the named insured, is the fact with which the Court of Appeals was concerned in stating that Joseph Bell is not a person included in Insuring Agreement V.

Based upon the foregoing erroneous assumption that the

Court of Appeals ignored Clause V of the policy, rather than having determined that Clause V of the policy provided no coverage, the petitioner then asserts that the Court of Appeals contravenes Indiana authority represented by statute, *Burns Indiana Statutes Annotated* (1952 Replacement) Section 39-4309, as construed by the Indiana courts to the effect that the Indiana automobile liability policy is required to provide coverage to the named insured for liability resulting from the operation of the described automobile by the named insured, or by any other person legally using the automobile with the permission of the named insured. Actually, the cases of *Culley* v. *Farm Bureau Mutual Insurance Co. of Indiana* (1946), 224 Ind. 483, 69 N. E. (2) 19, and *Shadow* v. *Standard Accident Insurance Company* (1942), 111 Ind. App. 19, 39 N. E. (2) 493, cited by petitioner (Pet. p. 16) though they suggested that the statute referred to requires only that the insurance policy protects the named insured with respect to the liability of the named insured arising out of the use of the automobile actually described in the policy, these cases, as well as the case of *Shedd* v. *Automobile Insurance Company of Hartford* (1935), 208 Ind. 621, 196 N. E. 227, disclose that the Indiana Supreme Court recognizes the validity of a policy exclusion which would deny coverage to the named insured, even for liability arising from the use of the automobile described in the policy. In each of the cases of *Culley* v. *Farm Bureau Mutual Insurance Co. of Indiana* (1946), 224 Ind. 483, and *Shedd* v. *Automobile Insurance Company of Hartford* (1935), 208 Ind. 621, the Indiana Supreme Court recognized and respected an automobile liability policy exclusion that denied coverage to the named insured for liability arising from the use of the described automobile by a minor, wherein the minor's use violated the exclusionary provisions of the policy. Thus, the holding of the Court of Appeals recognizing the

effect of the exclusionary language of the policy involved in the case at bar, in accordance with the express terms of the exclusionary language is consistent with the holdings of the Indiana Supreme Court pertaining to the Indiana Insurance Code, *Burns Indiana Statutes, Annotated* (1952 Replacement), Section 39-4309. It should be noted, however, that it is not necessary to determine whether or not the exclusionary language should be considered sufficient to render the statute (*Burns Indiana Statutes Annotated* (1952 Replacement), Section 39-4309) inapplicable, inasmuch as the statute pertains only to coverage that should be afforded the named insured, with respect to the use of the automobile described in the policy, and not to coverage with respect to the use of a strange automobile.

Petitioner asserts that the holding of the Court of Appeals is inconsistent with the holding of other courts to the effect that a named insured under an automobile liability policy who signed an application for a minor's driver's license under a statute like *Burns Indiana Statutes, Annotated* (1952 Replacement), Section 47-2706, is thereby assuming a liability that sounds in tort, (Pet. p. 18) and petitioner asserts that the holding of the Court of Appeals is inconsistent with the granting of coverage to the named insured for liability incurred as a result of bailment agreement covering the described policy. (Pet. p. 17.)

It is submitted that neither of these assertions are supported by the authorities cited and considered by the District Court as outlined in its opinion (Appendix A hereof) and by the Court of Appeals as outlined in petitioner's and respondent's briefs which are available to this court, with the respective appendices thereof. It is submitted further that the question involved in determining the rights of the parties under the insurance contract involved constitutes a question of pure state law, governed

by the law of Indiana with respect to which both the District Court and the Court of Appeals considered the application of the Indiana authorities cited as compared with authorities cited from other states. Reference to the opinion of the District Court included as Appendix A of this brief will make it obvious that the District Court carefully considered the application of the Indiana law to the circumstances involved in this action, and it is apparent that the judgment of the District Court affirmed by the Court of Appeals is not clearly in contravention of any principle of Indiana law, but on the contrary, represents a well considered attempt of the District Court, as well as the Court of Appeals, to comply with the Indiana law applicable to the construction of the automobile liability policy. Under these circumstances, and in the absence of the citation of any clearcut Indiana authority contravening the determination of the Court of Appeals, there is no basis upon which this court under its Rule 19 (b) will grant a writ of certiorari.

Petitioner asserts that the holding of the Court of Appeals conflicts with the decision of another court of appeals, and apparently refers to the case of *Preferred Accident and Insurance Company of New York* v. *Onali* (1942 C. C. 8), 125 Fed. (2) 580, in support of this contention. It should be noted that in the case cited, the 8th Circuit Court of Appeals was concerned with whether or not the assumption by the named insured of medical bills resulted in a violation of the exclusionary language of the automobile policy excluding coverage for liability assumed by agreement, wherein as the court stated, the assumption of medical bill liability is itself specifically provided for in the automobile liability policy by language similar to that appearing in Paragraph 16 of the section of the policy involved in the case at bar entitled "Conditions" quoted in the opinion of the Court of Appeals. (Pet. p. 25.) The

Eighth Circuit Court of Appeals in the cited case merely holds that the assumption by the named insured of medical bills at his own cost, as specifically provided for in the policy does not constitute a breach of the general policy exclusion against assumption by agreement of liability for the accident itself. It was not the liability for the accident with respect to which the Eighth Circuit Court of Appeals was concerned, but liability for medical bills only, and it should be noted that the liability assumed for the medical bills under the terms of the policy is itself liability assumed at the sole cost of the named insured and not at the expense of the insuror, or under coverage granted by the policy.

It is apparent that the case at bar involves solely a question of construing a contract of insurance with respect to which the law of the state (Indiana) applies (*Rosenthal* v. *New York Life Insurance Company* (1938), 304 U. S. 263, 58 S. Ct. 872, 82 Law Ed. 1330). This court in *Ruhlin* v. *New York Life Insurance Company* (1938), 304 U. S. 202 at 206, 58 S. Ct. 860, 82 Law Ed. 1290, at 1292, expresaly held that in such instance in which the question of construing an insurance policy which is a question of state law is involved, an alleged conflict of viewpoint among the Federal Circuit Courts of Appeals is not itself a reason for granting the writ of certiorari because the conflict, if any, may be corollary to a permissible difference of opinion among the state courts. As a matter of fact, in this same case of *Ruhlin* v. *New York Life Insurance Company*, after the Court determination of the proper construction of the insurance policy under the applicable state law ((1939 CCA3), 106 Fed. (2) 921), denied certiorari (1939) 309 U. S. 655, 60 S. Ct. 469, 84 Law Ed. 1005).

It is submitted that the records in this case, together with the opinions of the District Court and the Court of Appeals, discloses that the courts below carefully analyzed

the applicable state law of Indiana and applied it to the insurance contract and the circumstances existing and, therefore, regardless of any asserted difference of viewpoint (though respondent denies that any difference is disclosed by any indistinguishable authorities cited by petitioner) among courts of other states or federal circuits, this court will give great weight to the District Court's view of the state law of the state in which it sits. (*Gardner* v. *New Jersey* (1947), 329 U. S. 565 at 575, 91 Law Ed. 504 at 515; *Hillsborough* v. *Cromwell* (1945), 326 U. S. 620 at 630, 90 Law Ed. 358 at 366).

This court has stated that it will ordinarily accept and will, therefore, not review save in exceptional cases the considered determination of questions of state law by the intermediate federal appellate courts (*Huddleston* v. *Dwyer* (1944), 322 U. S. 232 at 237, 88 Law Ed. 1246 at 1249).

CONCLUSION.

It is submitted that the record discloses:

(a) Both the District Court and the Court of Appeals have given careful consideration and have resorted to discerning analysis of the out-of-state and other federal circuit court, as well as the applicable Indiana authorities, in determining a purely Indiana local contract construction controversy.

(b) There have been no authorities cited from other federal circuits which are indistinguishable and in conflict with the judgment under review.

(c) Conflict, if any existed with other federal circuits, is not a reason for granting certiorari in the case at bar, which is concerned only with a question of Indiana law.

(d) No Indiana authority is cited which is indistinguishable and in conflict with the judgment under review, and

this court will give great weight to the lower court's determination of the applicable Indiana legal principle and will accept the lower court's construction, save in an exceptional case of obvious error.

For the foregoing reasons, respondent contends that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

THE OPINION OF THE DISTRICT COURT.

"This is an action brought pursuant to Title 28, U. S. C. Section 2201, in which plaintiff seeks a declaratory judgment to the effect that an automobile liability insurance policy issued by plaintiff to one Robert E. Bell does not cover nor obligate plaintiff to defend either Robert E. Bell as one of the defendants, or any of the other defendants in another action now pending in this court referred to herein as the 'liability case' in which the plaintiffs in the liability case seek to recover damages for injuries allegedly suffered in an automobile accident which occurred on April 17, 1955, in the State of Pennsylvania.

The defendants, who are plaintiffs in the liability case together with Robert E. Bell, who is a defendant in the liability case, have filed a motion for summary judgment seeking a judgment to the effect that the insurance policy involved herein and hereinafter called the policy, obligates the plaintiff to defend Robert E. Bell, the named insured in the policy, as a defendant in said liability case. The plaintiff herein has filed a cross-motion for summary judgment seeking a judgment declaring that there is no coverage under said policy that would obligate plaintiff to defend or indemnify or respond in damages to any of the defendants in this action including Robert E. Bell with respect to the automobile and the automobile accident involved in said liability case.

It appears from the pleadings, affidavits, the motions and admissions of the parties herein incorporated in memoranda filed and stated in argument made herein that there are no genuine issues of fact with respect to the following

facts relevant to a determination of the issues of law submitted by the pleadings and said cross-motions for summary judgment.

At the time of the accident involved, Joseph Bell, deceased, a minor, was driving the automobile involved and is alleged in the liability case to have injured the plaintiffs therein by his negligent driving.

The plaintiff herein at the time of the accident had issued as insuror, and there was in effect, the policy to Robert E. Bell, of Terre Haute, Indiana, who was the only named insured in the policy, a copy of which policy is filed as Exhibit A of plaintiff's complaint.

The plaintiffs in the liability case charge Robert E. Bell as a defendant therein with having 'signed Joseph Bell's application for an Indiana Motor Vehicle Operator's License, and in so doing the defendant Robert E. Bell made a written undertaking as a part of said application wherein the defendant Robert E. Bell agreed to be responsible, jointly and severally with the said Joseph Bell, for any injury or damage which Joseph Bell might cause by reason of Joseph Bell's operation of a motor vehicle in all cases where Joseph Bell is liable in damages'.

The automobile which Joseph Bell was driving at the time of the accident involved was not the automobile described in the declaration in the policy of insurance issued by plaintiff herein, nor was the automobile driven by Joseph Bell owned by either of Joseph Bell, Robert Bell, or Robert Bell's spouse, if any.

Joseph Bell is alleged in the liability case at the time of the accident with having driven the automobile involved as the agent and servant of the persons Leo Light and Roy C. Hodge, doing business as the National Literary Association and as the agent and servant of the said James N. Lonigan and James C. Cochran.

There was no communication or understanding between Joseph Bell and Robert Bell or his spouse with respect to the automobile involved in the collision and neither Robert Bell, the named insured nor his spouse, nor anyone else for Robert Bell's benefit drove, maintained, used or owned the automobile involved in the accident, nor did Robert Bell or his spouse exercise any control over Joseph Bell in the operation of the automobile involved, nor did Robert Bell or his spouse occupy the automobile involved at the time of the accident, nor did Joseph Bell operate the automobile for the benefit of Robert Bell or his spouse at the time of the accident.

Inasmuch as the automobile involved in the accident was neither the automobile described in the policy nor was it being driven with the permission or consent of the named insured, it is apparent under the terms of the policy, without the citation of authority, that no coverage is extended under the policy to Joseph Bell or Ralph E. Brill, Administrator of the Estate of Joseph Bell, deceased, nor was Joseph Bell an 'insured' under the policy, nor do the defendants herein contend that Joseph Bell was an insured. It, therefore, remains only to determine whether or not the policy provides coverage under which plaintiff as insurer should be forced to defend and indemnify the named insured Robert Bell for the liability, if any, that Robert Bell may have incurred by reason of Joseph Bell's having negligently injured the plaintiffs in the liability case, because of Robert Bell's having 'signed Joseph Bell's application for an Indiana Motor Vehicle Operator's License and in so doing' having 'made a written undertaking as a part of said application wherein' he 'agreed to be responsible jointly and severally with the said Joseph Bell.'

The policy as well as the Indiana Statute prescribing the provisions required in automobile liability policies

(Burns Indiana Stat. Ann. 1952 Replacement, Sec. 39-4309) provided for insuring the owner (the named insured Robert Bell) against liability for damages, for injury to person or property resulting from negligence in the operation of the automobile described in the policy in the business of the owner or otherwise by any person legally using the automobile with the permission and consent of the named insured as the owner thereof.

The defendants herein rely upon the clause of the policy entitled 'Use of Other Automobiles', which provides in part as follows:

> 'V. Use of Other Automobiles. If the named insured is an individual who owns the automobile classified as "pleasure and business", or husband and wife, either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile, applies with respect to any other automobile, subject to the following provisions:
>
> "(a) With respect to the insurance for bodily injury liability and for property damage liability, the unqualified word 'insured' includes (1) such named insured, (2) the spouse of such individual if a resident of the same household, and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization."

Insuring Agreement III, 'Definition of Insured' does not apply to this insurance.

> '(b) This insuring agreement does not apply:
>
> "(1) To any automobile owned by, hired as a part of a frequent use of hired automobile by or furnished for a regular use to, the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;
>
> (2) To any automobile while used in the business

or occupation of the named insured or spouse, except a private passenger automobile operated or occupied by such named insured, spouse, chauffeur or servant; * * *"

The defendants contend in their motion for summary judgment that inasmuch as the policy thus covers the named insured, Robert E. Bell, with respect to 'any other automobiles' there is clearcut coverage in this case, because Robert E. Bell is or might be liable, by reason of signing Joseph Bell's driver's license application, for damages to the plaintiffs in the liability case, for personal injury and death suffered because of the negligent use or operation by Joseph Bell of any other automobile.

Plaintiff contends that the policy which, except for Clause V quoted above, covers only with respect to the use of the automobile described in the policy which was not involved in the accident, cannot be reasonably considered under the provisions of Clause V quoted above to extend coverage for liability, if any, assumed by Robert E. Bell collaterally to, and divorced from, Robert Bell's use of any automobile with respect to the use of an automobile foreign to the policy by a person not contemplated as an insured under the policy, and with respect to use over which neither Robert Bell nor his spouse has any control, and with respect to use which was for the benefit of persons who were not insureds under the policy and not for the benefit of Robert Bell or his spouse.

Plaintiff further contends that such liability, if any, as Robert E. Bell may have assumed by signing Joseph Bell's application for a driver's license, with respect to the use of the accident automobile by Joseph Bell, was 'liability assumed by the insured under any contract or agreement' for which the policy in the clauses concerned with exclusions expressly excluded from coverage.

If Clause V of the policy quoted above does not extend coverage to the named insured Robert E. Bell for liability of Robert E. Bell arising out of the use of an automobile not described in the policy, and not used by or for Robert Bell's benefit, there is no coverage and plaintiff should prevail. The parties herein state that they have failed to find any Indiana cases in which this 'use of other automobiles' clause in the standard automobile policy is construed, and the court's research has failed to disclose any such Indiana cases.

The court recognizes the broad general principal applicable to the construction of insurance policies to the effect that inasmuch as the policy is prepared by the insuror, any ambiguity should be construed against the insuror, but the court also recognizes the principle of construction to the effect that it is the true intention of the parties that is sought in construing written contracts, including insurance policies and, therefore, a reasonable as contrasted with a strained, extreme, or unreasonable construction of the language used should be adopted. Such cases as have been cited to illustrate the general intent and purpose of the 'use of other automobiles' clause, involved situations in which the accident automobile was actually used or occupied by the name insured.

> *Rodenkirk* v. *State Farm Mutual Auto Insurance Co.* (1945) 325 Ill. App. 421, 60 N. E. (2) 269;
>
> *Campbell* v. *Aetna Casualty & Surety Company* (1945 CA 4) 211 Fed. (2) 732, and the Notation in 173 A. L. R. 901.

The court, in the case of *Campbell* v. *Aetna Casualty & Surety Company*, supra, 211 Fed. (2) 732 at p. 736, concerning the purpose of this and 'use of other automobiles'

clauses similar to that involved in the policy herein, stated as follows:

> 'The great weight of authority is in accord with the interpretation of this provision by Judge Chestnut in *Alter* v. *Travelers Indemnity Co.*, D. C. Md., 92 F. Supp. 620, 623, where he said:
>
> > "This case involves the construction and application of the so-called 'drive other automobiles' clause of the present standard automobile liability policy. The general purpose and effect of this provision of the policy is to give coverage to the insured while engaged in the only infrequent or merely casual use of an automobile other than the one described in the policy, but not to cover him against personal liability with respect to his use of another automobile which he frequently uses or has the opportunity to do so. More specifically the evident intention of the limitation with respect to other automobiles is to prevent a situation in which the members of one family or household may have two or more automobiles actually or potentially used interchangeably but with only one particular automobile insured. That this is the general purpose of the provision is well and clearly stated in the annotation on the subject in 173 A.L.R. 901. And see *Lumbermens Mutual Cas. Co.* v. *Pulsifer* D. C. Me. 41 F. Supp. 249; *Rodenkirk* v. *State Farm Mut. Auto Ins. Co.* 325 Ill. App. 421, 60 N. E. 269".
>
> 'See also *Farm Bureau Mut. Auto Ins. Co.* v. *Boecher*, Ohio App. 48 N. E. 2d 895; *Island* v. *Firemen's Fund* Ind. Co. 30 Cal. 2d 541, 184 P. 2d 153, 173 A. L. R. 896; *Northwest Cas. Co.* v. *Legg*, 91 Cal. App. 2d 19, 204 P. 2d 106' *Vern* v. *Merchants Mut. Cas. Co. Sup.*, 118 N. Y. S. 2d 672; *Fleckenstein* v. *Citizens' Mutual Automobile Ins. Co.*, 326 Mich. 591, 40 N. W. 2d 733; cf. *Travelers Indemnity Co.* v. *Pray*, 6 Cir., 204 F. 2d 821.'

It is difficult to see how the 'use of other automobiles' clause can be said to extend the coverage to the named

insured for liability assumed for the use of a non-described automobile by a person who is not an insured, when the 'use of other automobiles' clause does not extend coverage, even to the named insured for the use by the named insured of an automobile not described in the policy, even though the automobile used might be owned by the named insured or a member of his household. It should be noted that sub-paragraph (a) of Clause V cited above, with respect to other automobiles extends coverage for the benefit of the named insured and his spouse and '(3) any other person * * * legally responsible for the use by said insured or spouse, of an automobile not owned by such other person'. It seems apparent from this extension of the definition of an insured under the 'use of other automobiles' clause only to those persons other than the named insured and his spouse who are legally responsible for the use by the named insured or by his spouse, of the other automobile, that the policy intends in Clause V to provide for extended coverage only for the use by the named insured or his spouse of such other automobile. The use of the other automobile by the named insured or his spouse, of course, could involve liability, not only on the part of the named insured or his spouse as users, but liability of either of them while the automobile was used by the other for his or her benefit, or liability of other persons for whom the named insured or his spouse uses the other automobile.

It should also be noted that sub-paragraph (b)(1) of Clause V quoted above excludes coverage even to the named insured for his own use if he regularly uses the automobile whether or not he owns the same, as pointed out in the cases cited above, and then in Clause (b)(2) there is the further precautionary language to the effect that if the use of the other automobile is a business use (for which the named insured would be responsible under the principal-agency rules) the automobile must actually be operated or at least occupied by the named insured, his spouse, chauf-

feur or servant. This precautionary language is intended for the obvious purpose of preventing the named insured enjoying the 'fleet' coverage for many automobiles used in his business by procuring a policy with the premium set upon the description of but one automobile in the policy.

If it is said that the named insured by signing another person's drivers license application, extends the coverage of his insurance policy for the regular use of any of an unlimited and undescribed number of automobiles (the sole purpose of a driver's license) by a person not an insured under the policy, it is extending coverage to the named insured for the regular use for which the named insured has voluntarily made himself responsible for purposes presumably in which he is interested and it would seem that the named insured thereby would be extending coverage for the regular use of other automobiles by the named insured or his nominee. This does violence to the intent and spirit of subparagraph (b)(1) of Clause V, as well as ignores the implicit requirement of subparagraph (a) and subparagraph (b)(2) that the named insured directly by operating, or indirectly by occupying the other automobile in order that Clause V extend coverage.

If the named insured by signing a driver's license for anyone, or an unlimited number of persons who are not insureds under the policy, may extend coverage for the use of an unlimited number of automobiles by an unlimited number of persons, it would mean that by Clause V the insuror had given the named insured a "blank check" to extend the coverage without limitation and without regard to the representations, warranties, declarations and exclusions provided for throughout the policy with the obvious purpose of limiting coverage in general to the named insured and his spouse, with respect to a described automobile and those persons who use the described automobile with the permission and consent of the named insured.

The court considers the only reasonable construction of the language used as a matter of law to be that the policy in Clause V extends coverage to the named insured or his spouse, or to any person legally responsible for the acts of the named insured or his spouse, for liability arising out of the casual or infrequent use by the named insured or his spouse, either directly by operating or indirectly by occupying and controlling the use of any other automobile not described in the policy.

It is the court's opinion, therefore, that plaintiff's motion for summary judgment should be sustained and defendant's motion overruled with respect to Count 2 of the complaint, inasmuch as Count 2 is based upon the premise that Clause V of the policy does not extend coverage to liability for the use of an automobile not described in the policy when used by a person who is not an insured contemplated in Clause V or any other provision of the policy.

It is not necessary, however, to base a determination of the rights of the parties under said policy solely upon a construction of the language of the 'use of other automobiles' clause of the policy. As pointed out in Count 1 of the complaint, upon which Count 1 is based, the policy also provides in part as follows: 'This policy does not apply: • • • (b) under coverages A, B, C, to liability assumed by the insured under any contract or agreement; • • •'

The liability, if any of Robert Bell arising from the use of automobile by Joseph Bell does not arise as an incident only of any relationship between Robert Bell and either of Joseph Bell or the automobile involved. It cannot be said, for instance, that the liability of Robert Bell arises because of a master-servant relationship of which vicarious tort liability is but an incident, nor can it be said that the liability, if any, arises as but an incident of the ownership of the automobile involved.

The fact that a bailor is liable for the negligence of his bailee because of the bailment as such in some states (such as California; (See *Norris* v. *Pacific Indemnity Company* (1951 California), 237 Pac. 66.), and the bailor is not liable as such in Indiana (*Fisher* v. *Fletcher* (1922), 191 Ind. 529, 135 N. E. 834), may affect the construction of an insurance policy that seeks to exclude coverage of a named insured's liability as bailor does not concern the court in this case, for Robert Bell was neither the owner nor the bailor of the automobile driven by Joseph Bell.

The fact that the bailor in Indiana may be liable for the independent act of negligence of entrusting his automobile to a bailee known to be an incompetent driver (*Reprzinski* v. *Mikulak* (1927), 93 Ind. App. 491, 157 N. E. 464) or that a father may be liable for negligence *per se* in violating the Indiana statute (Burns Ind. St. Ann. 1952 Replacement, Sec. 47-2904), which prohibits knowingly entrusting an automobile to an unlicensed minor under eighteen years of age (*Smith* v. *Thomas* (1955 Ind. App.), 130 N. E. 2d 85), does not concern the court in construing this policy, for Robert Bell is not alleged to have entrusted an automobile of his to an unlicensed minor or an incompetent driver.

The 'family purpose' doctrine has no application in Indiana, and the permission of the automobile owner alone is not enough to cause the liability of a negligent driver to be imputed to the non-driving owner. The bailee's use of the automobile in order that his negligence be imputed to the bailor in Indiana, must at least be for the benefit of or subject to the control of the non-driving owner (*Harper* v. *Puckett* (1952), 122 Ind. App. 528, 106 N. E. 2d 116; *Cates* v. *Long* (1947), 117 Ind. App. 444, 72 N. E. 2d 233. In any event the automobile used by Joseph Bell was not owned by Robert Bell nor was it used with Robert Bell's

permission or for Robert Bell's benefit, or subject to Robbert Bell's control, either directly or indirectly.

Under the terms of the policy which expressly makes its construction conform with the laws of the State of Indiana, under which it was issued, and under the laws of Indiana thus applicable, the liability, if any, of Robert Bell is incurred and the coverage of Robert Bell under the policy with respect to a non-described automobile, would be extended by the 'use of other automobiles' clause, if at all, only by reason of Robert Bell's having signed Joseph Bell's application for driver's license. Robert Bell is alleged to have agreed to be responsible with Joseph Bell by written undertaking in signing Joseph Bell's driver's license application prepared and executed pursuant to the Indiana Statute (Burns Ind. St. Ann. 1952 Replacement, Sec. 47-2706), which, after providing that the minor's drivers license application must be signed by a parent, guardian, custodian, employer, or anyone who is willing to assume the obligations imposed upon the signer by the statute, then provides in part as follows: '(d) any person so signing such application as above provided, thereby agrees to be responsible jointly and severally with such applicant, for any injury or damage which such applicant may cause by reason of the operation of a motor vehicle, in all cases where the applicant is liable in damages.'

Does the execution of the written undertaking as a part of the driver's license application under this statute constitute an assumption of liability by agreement as contemplated by the policy?

In the words of the statute the person signing 'thereby agrees to be responsible' and the 'agreement' is not an incident of any collateral relationship of the parties, but the assumption of liability alone is the fundamental and sole essence of the transaction of signing the driver's license.

The court's judgment could well depend upon the clear-cut language of the policy as well as the statute thus summarized, but the defendants strongly urge that the California court has determined that assumption of liability by signing a minor's driver's license application under the California statute does not constitute assumption of liability by agreement or contract as contemplated under the standard automobile policy such as is involved in this case. The defendants cite the cases of *Lackey* v. *Olds and Stroller Inter Exchange* (1927), 80 Cal. App. 687, 252 Pac. 672, and *Marple* v. *American Automobile Insurance Company* (1927), 82 Cal. App. 137, 255 Pac. 260.

In California, however, the statute with which the California court was concerned is different from the Indiana Statute in that the California statute, instead of being written in terms of agreement, is written in terms of imputing the minor's negligence or superimposing the minor's tort upon the driver's license signer. As stated in *McFarland* v. *Cordiero* (1929), 99 Cal. App. 352, 278 Pac. 889, at 890, the California statute provides that 'the application is signed by * * * the parent * * * having custody of such minor. * * * Any negligence of a minor so licensed in driving a motor vehicle upon a public highway shall be imputed to the person or persons who shall have signed the application of such minor for such license, which person or persons shall be jointly and severally liable with such minor for any damage caused by such negligence.' In both of the California cases of *Lackey* v. *Olds and Stroller Inter Exchange, supra* and *Marple* v. *American Automobile Insurance Co., supra,* the minor driving the automobile was driving the automobile with the permission and consent of the owner, and the automobile was owned by the person who signed the driver's license application, and the automobile was the automobile described in the insurance policy involved.

In California (different from Indiana) a bailor is liable for the negligent acts of his bailee within the scope of the bailment (*Norris* v. *Pacific Indemnity Company* (1951 Cal.), 237 Pac. 66) and a provision in an insurance policy purporting to exclude coverage when the car is being driven by a minor younger than sixteen years of age, will not be permitted by the court to exclude coverage wherein the named insured signed the minor's driver's license and the minor was driving the automobile described in the policy, and the policy expressly covered the owner's liability for the use of the described automobile while being driven with permission of the owner. (*Firkin* v. *Zurick General Accident & Liability Company* (1931), Ill. Cal. App. 655, 295 Pac. 1051.)

On the contrary, in Indiana, even though there is statutory liability imposed upon a parent for the negligent injury caused by a minor in permitting an unlicensed minor to operate an automobile (*Smith* v. *Thomas* (1955 Ind. App.), 130 N. E. 2d 85), the Indiana automobile policy, pursuant to its terms and pursuant to the Indiana statute (Burns Ind. St. Ann. 1952 Replacement, Sec. 39-4309; *Spickelmeier* v. *T. H. Mastin Co.* (1939), 107 Ind. App. 350, 24 N. E. 2d 797) is required to and does cover the owner's liability for the use of the automobile described in the policy, nevertheless, in an instance in which the owner of the automobile and the named insured permits an unlicensed minor to operate the described automobile, for which the owner and the named insured is liable, either under the statute or upon principal-agency relationship, the Indiana court holds that an exclusion of coverage for illegal driving by a minor will deny coverage to the owner. See *Culley* v. *Farm Bureau Mutual Insurance Company* (1946), 224 Ind. 483, 69 N. E. 2d 19.

As a matter of fact all of the cases cited by the defendants, in which the driver's license signing statute is in-

volved, represent cases in which the courts have had a statute that 'imputed' the negligence of the minor to the license signer and the courts have held that the liability by reason of the negligence imputed was incurred by the signer as a direct liability (rather than secondary) to the injured party. The liability to the injured party assumed by the signer under the 'imputed' negligence statutes is held by the courts to be liability in tort for negligence as contrasted with 'statutory liability' imposed by the statute.

Hickman v. *Tullos* (1954 M. D. Ala.), 121 Fed. Supp. 152.

McFarland v. *Cordiero* (1929), 99 Cal. App. 352, 278 Pac. 889.

Robinson v. *Hardway* (1943 Ky.), 169 S. W. 2d 823.

Whether the liability of the insured is itself considered *ex contractu* as compared with tort is immaterial in determining whether the insured has assumed the liability itself by agreement under the exclusion provisions of the policy.

St. Louis Police Relief v. *Aetna Casualty & Surety Company* (1941 Mo.), 154 S. W. 2d 782; (Contractual liability).

Western Casualty & Surety Company v. *Weimar* (1939 C. C. A. 9), 96 Fed. 2d 635.

Kindervater v. *Motorists Casualty Insurance Co.* (1938 N. J.), 199 Atl. 606 (tort liability).

The California court holds that the tort liability of the driver's license application signer imputed by the statute to the signer is assumed by the signer by the act of signing the application, and cites

(*McFarland* v. *Cordiero* (1929), 99 Cal. App. 352, 278 Pac. 889)

and the California court points out that such assumption is by contract in *Broome* v. *Kern Valley Packing Co.* (1935), 6 Cal App. 2d 256, 44 Pac. 2d 430, at page 433, wherein the court states 'Where a parent signs a minor's application for a license he becomes jointly and severally liable and a failure to find against the minor in such a case does not release the parent from the direct liability he has *assumed by his contract.* (Our emphasis.)'

This is, of course, consistent with the theory of the Alabama Federal Court in *Hickman* v. *Tullos, supra,* wherein the Alabama Federal Court points out that by signing the driver's license application the signer agrees to be liable, even though the liability assumed is then determined to sound in tort.

Though the California court concedes, as above pointed out, that the driver's license signer's liability is assumed by contract (whether the contract be by unilateral agreement or whether it be considered bilateral with the state or the minor for the benefit of the public, is immaterial), the California court in the cases of *Lackey* v. *Olds and Stroller Inter Exchange, supra,* and *Marple* v. *American Automobile Insurance Co., supra,* does not consider that such an assumption constitutes a breach of the policy sufficient to permit the insuror to deny coverage to the named insured for use of the policy described automobile which is owned by the named insured and being driven with permission and consent of the named insured by a minor whose driver's license application the named insured also signed. It should be noted that the owner's liability in California could be predicated as well upon the bailment law of California as upon the driver's license statute.

In any event, as indicated in the case of *Culley* v. *Farm Bureau Mutual Insurance Co., supra,* the Indiana court on the contrary, recognizes the efficacy of the policy exclusion to deny coverage to the automobile owner for the statu-

tory liability incurred by reason of entrusting the described automobile to an unlicensed minor, even though the court also had involved a minor driver who was the agent of the named insured owner.

If there were any doubt concerning the difference in the viewpoint of the Indiana court from that of the California court, with respect to the obligation of the insuror to extend the coverage to the named insured for liability incurred by reason of the use of a non-described automobile by one who is not an insured under the terms of the policy, an examination of the case of *Culley* v. *Farm Bureau Mutual Insurance Co., supra,* in connection with the Indiana court's analysis of the law of New York, which is similar to that of California, in the case of *Shadow* v. *Standard Accident Insurance Company* (1942) 111 Ind. App. 19, 39 N. E. 2d, 493, would dispel any such doubt. In the *Shadow* case, the Indiana court in explaining the broad contest of the language of the New York Court used in certain opinions cited, pointed out that the New York bailor-bailee liability law was different from the Indiana non-liability concept and that it was the owner's liability as bailor with which the New York Court was concerned in making statements to the effect that an insuror could not deny liability for injury caused by the use of a described automobile by a minor driver. It is the owner's liability that the Indiana court requires the insuror to indemnify and yet, even though the Indiana court recognizes the owner's liability for the use of an automobile entrusted to an unlicensed minor driver, or an agent, the Indiana court in the *Culley* case grants full effect to the policy exclusion denying coverage should the automobile be entrusted to a minor and liability incurred by the owner in a manner prohibited by the policy.

It is the court's opinion that the policy in the case at bar, when construed in connection with the Indiana law,

which differs substantially from that of California, excludes coverage for the liability assumed by Robert Bell as the named insured, if any, by reason of his having signed Joseph Bell's driver's license application and 'thereby agreeing to be responsible' for the negligence of Joseph Bell. Under the circumstances, therefore, the plaintiff's motion for summary judgment with respect to Count 1 of the complaint should be sustained and the motion of the defendants should be overruled.

It should be noted that reference to possible liability of Robert Bell for the acts of Joseph Bell under the circumstances involved in this case is not intended by the court to indicate any opinion of the court, either in the affirmative or the negative, as to whether or not there is any liability in fact or in law on the part of Robert Bell, with respect to the accident involved by reason of his having signed the driver's license application involved.

The defendants' motion for summary judgment in all respects shall, therefore, be overruled and the plaintiff's motion for summary judgment will be sustained with respect to both of Count 1 and Count 2 of the complaint, and judgment in accordance with the prayer of the complaint and in conformity with this opinion should be submitted by plaintiff's counsel.

Dated and filed this 1st day of April, 1957."